Kam Thai Eng Linda & Anor v Tan Sri Dato' Kam Woon Wah & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(A)-762-07/2020
NOR BEE ARIFFIN, HADHARIAH SYED ISMAIL AND SEE MEE CHUN JJCA
11 AUGUST 2022

Companies and Corporations — Shares — Shareholders agreement — Originating summons sought declaration that void — Whether originating summons should have been made pursuant to Companies Act 1965 or Companies Act 2016 — Whether OS untenable — Whether judicial estoppel applied — Companies Act 1965 s 132E — Companies Act 2016 s 228

This was an appeal against the decision of the judicial commissioner ('JC') in dismissing the originating summons ('OS') filed by the appellants ('plaintiffs'). The OS was essentially to seek a declaration that the shareholders agreement ('SA') between the first defendant/first respondent ('TS Kam') and the second respondent/second defendant ('Andrew') was illegal, null and void, and unenforceable. The plaintiffs were directors and/or shareholders of Raub Mining & Development Co Sdn Bhd (RMDC, the third defendant), Raub Oil Mill Sdn Bhd (ROM, the fourth defendant), and other companies (the fifth to ninth defendants). RDMC wholly owned ROM. The fifth to eighth defendants held part of the shares in RMDC. The ninth defendant held about half of the shares in RMDC. TS Kam was the father of the plaintiffs and Andrew. He held seven shares in RMDC and was the majority shareholder in the fifth to seventh and ninth defendants. Andrew was the plaintiffs' brother. He held one share in RMDC and was a shareholder of fifth to seventh and ninth defendants. Andrew had previously commenced Suit 352 against TS Kam, the third to ninth defendants, a few other companies and two other individuals who were the company secretary to the corporate defendants to enforce the SA. It was now submitted by the plaintiffs and TS Kam that Andrew had taken a different legal position in Suit 352 and in the OS and having obtained an advantage, could not now be allowed to resile from it. It was said Andrew's position in Suit 352 was that the SA would require TS Kam to transfer his seven shares in RMDC, and the corporate defendants to transfer their shares in RMDC to Andrew; whereas in the OS for TS Kam to transfer his seven shares in RMDC, and his shares in the fifth to eighth defendants, to Andrew. Andrew, however submitted that it was never the plaintiffs' or TS Kam's case that judicial estoppel applied. It was only raised in TS Kam's third affidavit where it was stated that Andrew's position in respect of the SA was a radical departure from the position taken by him before the Court of Appeal

arising from Suit 352. The JC, nevertheless, found, amongst others, that: (a) judicial estoppel did not apply; and (b) the OS was untenable was because it should have been made pursuant to s 132E of the Companies Act 1965 ('the CA 1965') and not s 228 of the Companies Act 2016 ('the CA 2016') as was done here as the CA 1965 was the legislation in force at the time the SA was entered into. The issues that arose for determination, inter alia, were: (i) whether the CA 2016 or CA 1965 applied to the OS; (ii) whether judicial estoppel applied in this appeal; and (iii) whether the SA contravened s 228 of the CA 2016.

Held, dismissing the appeal with costs:

(1) The OS could fall within s 228 of the CA 2016 where a company could not carry into effect any arrangement or transaction which was prohibited within the meaning of that provision. That was the effect of what Andrew was seeking to do when filing Suit 352. This would mean that the relevant date to determine the applicable law had to be the date on which proceedings were brought to test the validity of the SA and not the date of the SA itself. This was made clear by s 619(4) of the CA 2016 itself which effectively meant that all proceedings, judicial or otherwise, commenced before and pending before the commencement of the CA 2016 under the CA 1965 shall be deemed to have been commenced and may be continued under the CA 1965. This was the only section dealing with litigation and limited the application of the CA 1965 to only those litigation commenced under the CA 1965. It could therefore be construed that litigation which had not commenced under the CA 1965 must necessarily be commenced under the CA 2016. Hence the plaintiffs were correct to have brought the OS under s 228 of the CA 2016. To that extent, the JC was in error to have found otherwise (see paras 20–22, 27 & 30).

(2) The context upon which Andrew's position was taken was to address a specific application. If Andrew's claim was to prevail in Suit 352, he would hold 50% of TS Kam's entire shares in RMDC whether they were held directly by TS Kam or through the fifth to eighth defendants and there was no agreement with the fifth to eighth defendants to transfer their shares in RMDC to Andrew in Suit 352. Due to Andrew's ownership of TS Kam's indirect shareholding, it followed that Andrew could require TS Kam to cause the fifth to eighth defendants to transfer their shares in RMDC to Andrew. The transfer of the fifth to eighth defendants' shares in RMDC were not necessary steps to be taken as Andrew may well be contented with TS Kam transferring his shares in the fifth to eighth defendants to him. It was in that context that it was held there was no suggestion of a legal position taken that the fifth to eighth defendants were obliged to transfer their shares in RMDC and this court agreed with that finding. In the circumstances of the case, judicial

A estoppel did not arise. In any event, it could not be said that Andrew had obtained any advantage in having the striking out application by TS Kam dismissed (see paras 39–40 & 55).

(3) The SA did not result in the disposal of shares held by the fifth to ninth B defendants in RDMC. Thus, there was no change to the assets or value of the fifth to ninth defendants in so far as RDMC was concerned. There was therefore no contravention of s 228 of the CA 2016 (see paras 61 & 64).

C **[Bahasa Malaysia summary**

Ini adalah rayuan terhadap keputusan pesuruhjaya kehakiman ('JC') dalam menolak saman pemula ('OS') yang difailkan oleh perayu ('plaintif-plaintif'). OS pada asasnya adalah untuk mendapatkan satu deklarasi bahawa perjanjian pemegang saham ('SA') antara defendan pertama/responden pertama ('TS D Kam') dan responden kedua/defendan kedua ('Andrew') adalah bertentangan dengan undang-undang, batal dan tidak sah, dan tidak boleh dikuatkuasakan. Plaintif adalah pengarah dan/atau pemegang saham Raub Mining & Development Co Sdn Bhd (RMDC, defendan ketiga), Raub Oil Mill Sdn Bhd (ROM, defendan keempat), dan syarikat-syarikat lain (defendan kelima E hingga kesembilan). ROM milik penuh RDMC. Defendan kelima hingga kelapan memegang sebahagian daripada saham dalam RMDC. Defendan kesembilan memegang kira-kira separuh daripada saham dalam RMDC. TS Kam adalah bapa kepada plaintif dan Andrew. Beliau memegang tujuh saham dalam RMDC dan merupakan pemegang saham majoriti dalam defendan F kelima hingga ketujuh dan kesembilan. Andrew adalah abang plaintif. Beliau memegang satu saham dalam RMDC dan merupakan pemegang saham defendan kelima hingga ketujuh dan kesembilan. Andrew sebelum ini telah memulakan Guaman 352 terhadap TS Kam, defendan ketiga hingga kesembilan, beberapa syarikat lain dan dua individu lain yang merupakan G setiausaha syarikat kepada defendan korporat untuk menguatkuasakan SA. Ia kini telah dihujahkan oleh plaintif dan TS Kam bahawa Andrew telah mengambil kedudukan undang-undang yang berbeza dalam Guaman 352 dan dalam OS dan setelah mendapat kelebihan, kini tidak boleh dibenarkan untuk melepaskan diri daripadanya. Ianya telah dikatakan bahawa kedudukan H Andrew dalam Guaman 352 adalah SA akan memerlukan TS Kam memindahkan tujuh sahamnya dalam RMDC, dan defendan korporat memindahkan saham mereka dalam RMDC kepada Andrew; manakala dalam OS untuk TS Kam memindahkan tujuh sahamnya dalam RMDC, dan sahamnya dalam defendan kelima hingga kelapan, kepada Andrew. Andrew, I bagaimanapun berhujah bahawa ia bukanlah kes plaintif atau TS Kam bahawa estoppel kehakiman terpakai. Ia hanya dibangkitkan dalam afidavit ke-3 TS Kam di mana ia menyatakan bahawa kedudukan Andrew berhubung dengan SA adalah penyimpangan radikal daripada kedudukan yang diambil olehnya di hadapan Mahkamah Rayuan yang timbul daripada Guaman 352. JC,

bagaimanapun, mendapati, antara lain , bahawa: (a) estoppel kehakiman tidak terpakai; dan (b) OS tidak boleh dipertahankan adalah kerana ia sepatutnya dibuat menurut s 132E Akta Syarikat 1965 ('AS 1965') dan bukan s 228 Akta Syarikat 2016 ('AS 2016') seperti yang telah dilakukan di sini kerana AS 1965 adalah perundangan yang berkuat kuasa pada masa SA dimeterai. Isu yang timbul untuk penentuan, antara lain, adalah: (i) sama ada CA 2016 atau AS 1965 terpakai untuk OS; (ii) sama ada estoppel kehakiman terpakai dalam rayuan ini; dan (iii) sama ada SA melanggar s 228 CA 2016.

Diputuskan, menolak rayuan dengan kos:

(1) OS boleh jatuh dalam s 228 CA 2016 di mana syarikat tidak boleh melaksanakan sebarang pengaturan atau transaksi yang dilarang mengikut maksud peruntukan tersebut. Itulah kesan daripada apa yang Andrew cuba lakukan semasa memfailkan Guaman 352. Ini bermakna tarikh yang berkaitan untuk menentukan undang-undang yang terpakai mestilah tarikh prosiding dibawa untuk menguji kesahihan SA dan bukan tarikh SA tersebut sendiri. Ini telah dijelaskan dengan jelas oleh s 619(4) AS 2016 itu sendiri yang secara berkesan bermaksud bahawa semua prosiding, kehakiman atau sebaliknya, dimulakan sebelum dan belum selesai sebelum permulaan AS 2016 di bawah AS 1965 hendaklah dianggap telah dimulakan dan boleh diteruskan di bawah AS 1965. Ini adalah satu-satunya bahagian yang berurusan dengan litigasi dan mengehadkan pemakaian AS 1965 kepada hanya litigasi yang dimulakan di bawah AS 1965. Oleh itu, boleh ditafsirkan bahawa litigasi yang belum dimulakan di bawah AS 1965 mestilah semestinya dimulakan di bawah AS 2016. Oleh itu, plaintif adalah betul kerana telah membawa OS di bawah s 228 AS 2016. Oleh itu, JC terkhilaf kerana membuat dapatan sebaliknya (lihat perenggan 20–22, 27 & 30).

(2) Konteks di mana kedudukan Andrew diambil adalah untuk menangani permohonan tertentu. Jika tuntutan Andrew adalah untuk mengatasi Guaman 352, beliau akan memegang 50% daripada keseluruhan saham TS Kam dalam RMDC sama ada ia dipegang secara langsung oleh TS Kam atau melalui defendan kelima hingga kelapan dan tidak ada persetujuan dengan defendan kelima hingga kelapan untuk memindahkan saham mereka dalam RMDC kepada Andrew dalam Guaman 352. Disebabkan oleh pemilikan Andrew ke atas pegangan saham tidak langsung TS Kam, lanjutan itu Andrew boleh memerlukan TS Kam untuk menyebabkan defendan kelima hingga kelapan memindahkan saham mereka dalam RMDC kepada Andrew. Pemindahan saham defendan kelima kepada kelapan dalam RMDC bukanlah langkah yang perlu diambil kerana Andrew mungkin berpuas hati dengan TS Kam memindahkan sahamnya dalam defendan kelima hingga kelapan kepadanya. Dalam konteks itu, ia diputuskan bahawa tidak ada cadangan kedudukan undang-undang yang diambil bahawa

defendan kelima hingga kelapan diwajibkan untuk memindahkan saham mereka dalam RMDC dan mahkamah ini bersetuju dengan dapatan tersebut. Dalam keadaan kes tersebut, estoppel kehakiman tidak timbul. Dalam apa jua keadaan, ia tidak boleh dikatakan bahawa Andrew telah memperoleh sebarang kelebihan apabila permohonan pembatalan oleh TS Kam ditolak (lihat perenggan 39–40 & 55).

(3) SA tidak menyebabkan pelupusan saham yang dipegang oleh defendan kelima hingga kesembilan dalam RDMC. Oleh itu, tiada perubahan kepada aset atau nilai defendan kelima hingga kesembilan setakat RDMC berkenaan. Oleh itu, tiada pelanggaran s 228 CA 2016 (lihat perenggan 61 & 64).]

Cases referred to

Che Esah & Anor v Che Limah [1966] 1 MLJ 36, FC (folld)
Director of Elementary Education, Odisha & Ors v Pramod Kumar Sahoo (Civil Appeal No 7577 2019) (unreported) (refd)
Government of Malaysia v Zainal bin Hashim [1977] 2 MLJ 254b, FC (folld)
Leisure Farm Corp Sdn Bhd v Kabushiki Kaisha Ngu (formerly known as Dai-Ichi Shokai) & Ors [2017] 5 MLJ 63, CA (folld)
Mak Siew Wei v Yeoh Eng Kong and other appeals [2020] 1 MLJ 258; [2019] 7 CLJ 470, CA (refd)
NHB Ltd and another v Hoare and others [2006] EWHC 73 (Ch), Ch D (refd)
OJSC Oil Co Yugraneft (in liquidation) v Abramovich and others [2008] EWHC 2613, QBD (refd)
Peguam Negara v Nurul Izzah bt Anwar & Ors [2017] 4 MLJ 656, CA (folld)
Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other appeals [2012] 3 MLJ 616; [2012] 5 CLJ 169, CA (refd)
Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd (formerly known as Ekspidisi Ria Sdn Bhd) [2005] 4 MLJ 101; [2005] 3 CLJ 238, CA (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) s 132E
Companies Act 2016 ss 228, 228(1), (2), 619(4), 620(4)

Appeal from: *Kam Thai Eng Linda & Anor v Tan Sri Dato' Kam Woon Wah & Ors* [2019] MLJU 2049 (High Court, Kuala Lumpur)

Cyrus Das (with Lim Choon Khim, Chin Yan Leng and David Yii Hee Kiet) (Chooi, Saw & Lim) for the appellant.
Gopal Sri Ram (with Wong Yee Chue, Yasmeen Soh Sha-Nisse and Lai Wing Ee) (YC Wong) for the first respondent.
Malik Imtiaz Sarwar (with Mathew Thomas Philip, Khoo Suk Chyi, Voon Su Huei, Yeoh Ean Cheen and Ahmad Iyas Husni) (Thomas Philip) for the second respondent.

See Mee Chun JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the learned judicial commissioner ('JC') in dismissing the originating summons ('OS') filed by the appellants/plaintiffs. The OS was essentially to seek a declaration that the shareholders agreement dated 16 January 2017 ('SA') between the first respondent/first defendant ('TS Kam') and the second respondent/second defendant ('Andrew') is illegal, null and void and unenforceable. The basis for this is the contravention of s 228 of the Companies Act 2016 ('the CA 2016'). An injunction was also sought to restrain the fifth to eighth defendants from carrying into effect the SA.

[2] We dismissed the appeal and our reasons are as follows.

PARTIES

[3] Parties will be referred to as they were in the High Court except for the following specific assigned abbreviations.

[4] The plaintiffs are directors and/or shareholders of Raub Mining & Development Co Sdn Bhd (RMDC, third defendant), Raub Oil Mill Sdn Bhd (ROM, fourth defendant), and other companies (fifth to ninth defendants).

[5] RDMC wholly owns ROM. The fifth to eighth defendants hold part of the shares in RMDC. The ninth defendant holds about half of the shares in RMDC.

[6] In para 5 of the plaintiffs' affidavit in support, there is a diagram to reflect the relationship between the companies as follows:

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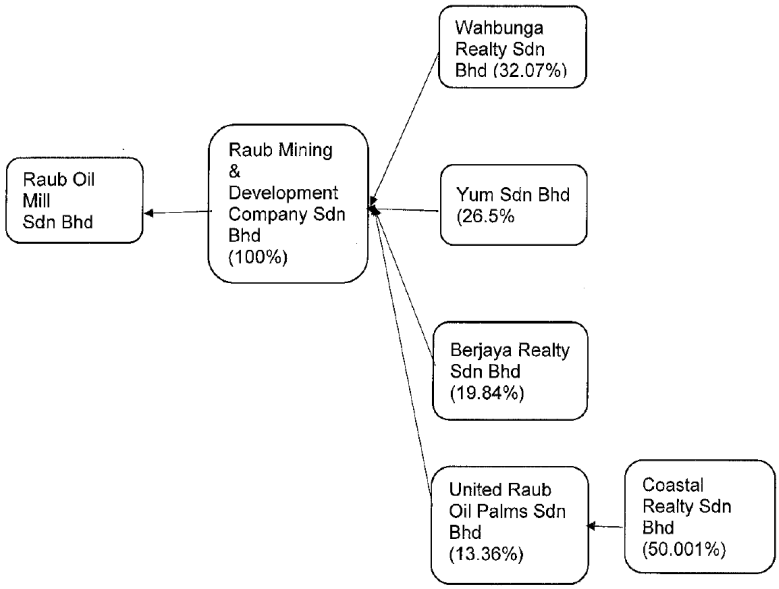
Wahbunga Realty Sdn Bhd (32.07%)
Raub Mining & Development Company Sdn Bhd (100%)
Raub Oil Mill Sdn Bhd
Yum Sdn Bhd (26.5%
Berjaya Realty Sdn Bhd (19.84%)
United Raub Oil Palms Sdn Bhd (13.36%)
Coastal Realty Sdn Bhd (50.001%)

[7] TS Kam is the father of the plaintiffs and Andrew. He holds seven shares in RMDC and is the majority shareholder in the fifth to seventh and ninth defendants.

[8] Andrew is the plaintiffs' brother. He holds one share in RMDC and is a shareholder of fifth to seventh and ninth defendants.

[9] Although named as the first defendant in the OS and the first respondent in this appeal, TS Kam supported the plaintiffs in the OS and now supports the appellants in this appeal.

DECISION OF THE High Court

[10] The learned JC's grounds dated 26 June 2020 are found in encl 28/35–74 (non pdf).

[11] It was found that judicial estoppel did not apply. This was because neither a litigant nor the court was bound by statements of law or legal conclusions made by counsel to the court, in particular when dealing with the construction of a contract. *Director of Elementary Education, Odisha & Ors v Pramod Kumar Sahoo* (Civil Appeal No 7577 2019) (unreported) and *Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd (formerly known as Ekspidisi Ria Sdn Bhd)* [2005] 4 MLJ 101; [2005] 3 CLJ 238 were referred to. Further, the context under which the statement or legal position taken by counsel had to be understood where such are made in the course of submission

to address a specific application. It had also not been established that Andrew succeeded in the striking out applications and the ad interim injunction due to the assertions made by him (*Peguam Negara v Nurul Izzah bt Anwar & Ors* [2017] 4 MLJ 656).

[12] The SA was found not to contravene s 228 of the CA 2016. Reference was made to a decision of this court in *Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other appeals* [2012] 3 MLJ 616; [2012] 5 CLJ 169 where there can only be a disposal if there is a transfer or change in beneficial ownership. There was no disposal of RMDC shares by the fifth to eighth defendants to Andrew nor an acquisition of RMDC shares by Andrew from the aforesaid defendants.

[13] A further reason why the OS was untenable was because it should have been made pursuant to s 132E of the Companies Act 1965 ('CA 1965') and not s 228 of the CA 2016 as was done here. CA 1965 was the legislation in force at the time the SA was entered into. Section 619(4) of the CA 2016 was not relevant as it was merely to preserve proceedings commenced before the coming into force of the CA 2016. The relevant provision would be s 620(4) of the CA 2016. *Mak Siew Wei v Yeoh Eng Kong and other appeals* [2020] 1 MLJ 258; [2019] 7 CLJ 470 was cited to support this finding.

OUR DECISION

Whether CA 2016 or CA 1965 applies

[14] We will first deal with whether it is CA 2016 or CA 1965 which applies to this OS.

[15] The SA between TS Kam and Andrew was entered into on 16 January 2017 before CA 2016 came into force on 31 January 2017.

[16] The relevant provisions on arrangements or transactions involving directors can be found in s 132E of the CA 1965 and s 228 of the CA 2016 as follows.

> 132E CA 1965 Substantial property transaction by director or substantial shareholder
>
> (1) Subject to subsection (2) and section 132F, a company shall not carry into effect any arrangement or transaction where a director or a substantial shareholder of the company or its holding company, or a person connected with such a director or substantial shareholder:
>
> (a) acquires or is to acquire shares or non-cash assets, of the requisite value, from the company; or

A (b) disposes of or is to dispose of shares or non-cash assets of the requisite value, to the company.

(2) An arrangement or transaction which is carried into effect in contravention of subsection (1) shall be void, unless there is prior approval of the arrangement or transaction:

B (a) by a resolution of the company at a general meeting; or

(b) by a resolution of the holding company at a general meeting, if the arrangement or transaction is in favour of a director or substantia! shareholder of its holding company or person connected with such

C director or substantial shareholder.

228 CA 2016 Transactions with directors, substantial shareholders or connected persons.

(1) Subject to subsection (2) and section 229, a company shall not enter or

D carry into effect any arrangement or transaction where a director or a substantial shareholder or the company or its holding company, or its subsidiary, or a person connected with a director or substantial shareholder:

E (a) acquires or is to acquire shares or non-cash assets of the requisite value, from the company; or

(b) disposes of or is to dispose of shares or non-cash assets of the requisite value; to the company,

unless —

(A) the entering into the arrangement or transaction is made subject to the

F approval of shareholders at a general meeting; or

(B) the carrying into effect of the arrangement or transaction has been approved by shareholders at a general meeting,

(2) An arrangement or transaction which is carried into effect in contravention of subsection (1) shall be void unless there is prior approval

G of the arrangement or transaction —

(a) by a resolution of the company; or

(b) by a resolution of the holding company, if the arrangement or transaction is in favour of a director or substantial shareholder of its

H holding company or person connected with such director or substantial shareholder.

[17] We note that there is a difference between both provisions in that s 132E of the CA 1965 deals with 'enter into' of the arrangement or transaction

I whereas s 228 of the CA 2016 deals with 'enter or carry into effect' of the arrangement or transaction.

[18] Andrew's counsel contended that the premise of the OS was on the basis of the SA being entered into, which brought it within s 132E of the CA 1965.

This may be seen in the relief for a declaration that the SA is illegal, which means its entry and grounds (1) where the words 'entered into' and the word 'illegal' in (3). There was also a reference to 'entered into agreement' in para 8 of the affidavit in support.

[19] The response to this was that 'illegal' can be at two stages namely entry or carry into effect. The plaintiffs rely on 'carry into effect' although it was not expressly pleaded, as that is equivalent to implementation which took place when Andrew brought Suit WA-22NCC-352–09 of 2019 ('Suit 352') in September 2017 to carry into effect the SA. This entailed the invoking of s 228 of the CA 2016. Reference was made to the words 'when implemented' in para 8 of the affidavit in support and the words 'seeking to enforce' in the same, and the words 'to carry into effect in para 7 of the affidavit in reply (1)'.

[20] We find the OS can fall within s 228 of the CA 2016 where a company cannot carry into effect any arrangement or transaction which is prohibited within the meaning of that provision. This was the effect of what Andrew was seeking to do when filing Suit 352. This would mean that the relevant date to determine the applicable law has to be the date on which proceedings are brought to test the validity of the SA and not the date of the SA itself.

[21] This is in fact made clear by s 619(4) of the CA 2016 itself which states the following:

> 619(4) All proceedings, judicial or otherwise commenced before and pending immediately before the commencement of this Act under the Companies Act 1965 shall be deemed to have commenced and may be continued under that Act.

[22] This provision effectively means that all proceedings, judicial or otherwise, commenced before and pending before the commencement of CA 2016 under CA 1965 shall be deemed to have been commenced and may be continued under CA 1965. This is the only section dealing with litigation and limits the application of CA 1965 to only those litigation commenced under CA 1965. This provision appears under the heading 'General transitional provisions'. It can therefore be construed that litigation which has not commenced under CA 1965 must necessarily be commenced under CA 2016.

[23] This is to be contrasted to s 620(4) of the CA 2016 appearing under the heading 'Repeal and Savings'. This was said by the learned JC to be the relevant provision. It provides as follows:

> 620(4) Any right, privilege, obligation or liability acquired, accrued or incurred before the effective date or any legal proceedings, remedy or investigation in respect of such right, privilege, obligation or liability shall not be effected by this Act and shall continue to remain in force as if this Act has not been enacted.

[24] It is our considered opinion that this section deals only with any right, privilege, obligation which accrued before the effective date and these are not affected by CA 2016.

[25] We add that this does not amount to CA 2016 being given retrospective effect as the CA 2016 is to be invoked on the day when Suit 352 was filed and is to be applied as from that day. We refer to *Che Esah & Anor v Che Limah* [1966] 1 MLJ 36 at p 37:

> ... In my view, therefore, as the law applicable was the law as it existed at the date of the hearing, and as the tenancy was then protected by the provisions of the Control of Rent Ordinance 1956, no order for possession could be made.

[26] It was similarly said in *Government of Malaysia v Zainal bin Hashim* [1977] 2 MLJ 254b at p 256:

> ... This means, on the authority of *Quilter v Mapleson* that we are authorised to make such order on this appeal as ought to be made according to the law as it stands not at the time of the trial but at the time of this appeal.

[27] This therefore means the law applicable is when the enforceability or implementation of the SA is being sought. The learned JC was not persuaded by *Che Esah* and *Zainal bin Hashim* where he had earlier found that s 132E of the CA 1965 should be the applicable provision. Given that we have found that it should be s 228 of the CA 2016 that applies, we do not see any reason why the principles in *Che Esah* and *Zainal bin Hashim* cannot apply with equal force in our instant appeal.

[28] In *Mak Siew Wei* which was cited by the learned JC, this was said at p 481:

> [22] In brief, the learned High Court judge held thats 620(4) of the 2016 Act, as the savings provision, preserves any rights acquired before the enactment of the 2016 Act. Her Ladyship therefore held that no interpretative exercise is needed to determine whether the 2016 Act is retrospective or prospective, as such an exercise is only necessary where a statute is unclear. We concur with her view that the intention of Parliament is unambiguous that the 2016 Act is to be applied prospectively, and that any rights accrued before its enactment will survive. Under the old Companies Act 1965, the plaintiff has the right to bring a common law derivative action. This right has been preserved by s 620(4) of the 2016 Act.

[29] We find that to be a correct proposition of law insofar as it applies to rights which accrued before CA 2016, to survive, in the form of common law derivative action. This was made amply clear by the last two statements 'Under the old Companies Act 1965, the plaintiff has the right to bring a common law derivative action. This right has been preserved by s 620(4) of the 2016 Act'. In

fact, we would say this case drives home the point we said earlier in relation to any right, privilege, obligation which accrued before the effective date which are not affected by CA 2016.

[30] Hence the plaintiffs were correct to have brought the OS under s 228 of the CA 2016. To that extent, the learned JC was in error to have found otherwise.

Judicial estoppel

[31] We now deal with whether judicial estoppel applies in this appeal. We agree that the principle of judicial estoppel is recognised in our shores as enunciated by this court in *Nurul Izzah* and *Leisure Farm Corp Sdn Bhd v Kabushiki Kaisha Ngu (formerly known as Dai-Ichi Shokai) & Ors* [2017] 5 MLJ 63.

[32] In *Nurul Izzah* it was said with reference to the case of *OJSC Oil Co Yugraneft (in liquidation) v Abramovich and others* [2008] EWHC 2613 (Comm) at pp 671–673:

> [17] The argument before us was also directed on the issue of an abuse of process in which we were pressed with the argument that the appellant was estopped from objecting to the application for judicial review as in another similar application involving identical issues, that is, the Selangor Government case, the appellant did not object during the leave stage. The implication was that the appellant was now estopped from objecting to the application herein as the two cases were similar. The appellant had effectively agreed that the matters raised in the Selangor Government case were amenable to judicial review, this is a position that the appellant had taken in its capacity as the representative of the public. The appellant was estopped from taking an inconsistent position by objecting to leave in this case. Such a position, learned counsel argued, amounted to an abuse of the court process referring in this connection to the case of *OJSC Oil Co Yugraneft (in liquidation) v Abramovich and others* [2008] EWHC 2613 (Comm) in which Christopher Clarke J said, at paras 429–430:
>
> > [429] They also refer, by way of an analogy to a US doctrine described as 'judicial estoppel' under which a party who assumes a particular position in litigation and succeeds in persuading the court to accept that position may not be permitted to take an inconsistent position in later litigation. The court of appeals for the Sixth Circuit explained the position in *Edwards v Aetna Life and Casualty* 690 F 2s 595 (1982): The policies supporting judicial estoppel are different from those that support the more common doctrines of issue preclusion, equitable and collateral estoppel, courts apply equitable estoppel to prevent a party from contradicting a position taken in a prior judicial proceeding ... Equitable estoppel enables a party to avoid litigating, in the second proceeding, claims which are plainly inconsistent with those litigated in the first proceeding. Because the doctrine is intended to ensure fair dealing between the parties, the courts will apply the doctrine only if the party asserting the estoppel was a party in the prior

proceeding and if that party has detrimentally relied upon his opponent's prior position. See Id at 689–90. Collateral estoppel prevents relitigation of factual matters that were fully considered and decided in a prior proceeding. Thus, collateral estoppel operates to prevent repetitive litigation ...

The doctrine of judicial estoppel applies to a party who has successfully and unequivocally asserted a position in a prior proceeding; he is estopped from asserting an inconsistent position in a subsequent proceeding ... Unlike equitable estoppel, judicial estoppel may be applied even if detrimental reliance or privity does not exist ... This distinction reflects the difference in the policies served by the two rules. Equitable estoppel protects litigants from less than scrupulous opponents. Judicial estoppel, however, is intended to protect the integrity of the judicial process. ... *Scarano v Central R Co*, 203 F2d 510, 51213 (3rd Cir 1953) ('such use of inconsistent positions would most flagrantly exemplify that playing 'fast and loose with the courts' which has been emphasised as an evil the court should not tolerate'). The essential function of judicial estoppel is to prevent intentional inconsistency; the object of the rule is to protect the Judiciary, as an institution, from the perversion of judicial machinery, ... Collateral estoppel is essentially a finality rule, which serves to conserve judicial resources by precluding the litigation of issues previously decided. Judicial estoppel addresses the incongruity of allowing a party to assert a position in one tribunal and the opposite in another tribunal. If the second tribunal adopted the party's inconsistent position, then at least one court has probably been misled ...

[430] Sibir mounted a claim based on the contention that the receipt by the six offshore companies of the participation interests (knowingly assisted by Mr Abramovich) was unlawful. It failed in that attempt since the BVI courts, held that the relevant law is the law of Russia, by which law Sibir has no claim. They did so as a result of Sibir's own contention that there was no claim in Russian law by Sibir (or Yugraneft). Now through Yugraneft, its privy, it seeks to bring a claim in knowing receipt against Mr Abramovich and Millhouse, on the footing that the receipt was unlawful in Russian law. Yugraneft also seeks to bring a claim in knowing assistance against Mr Abramovich when Sibir had previously claimed that the BVI court should refuse a stay on the ground that neither it not Yugraneft had any claim. *That seems to me an abuse of the process of the courts. Part of the rationale for the doctrine is the protection of the court's process and avoidance of the harassment of defendants. Sibir's changes of tack and jurisdiction, alleging, at one moment, that the claims are governed by BVI law as the place of receipt, then BVI law as the law of the forum, then English law as the place of enrichment, and that Russian law: (a) does not and (b) does afford a remedy, seems to me to offend on both counts.* This is not only an example of forum shopping but of issue switching which the courts should not be prepared to tolerate. (Emphasis added.)

[33] In *Leisure Farm* it was stated at pp 74 and 75:

[16] ... It is clear to this court that the object of judicial estoppel is to prevent a party who assumes a particular position in litigation to take an inconsistent position in later litigation. Christopher Clarke J explained the law on judicial estoppel in *OJSC Oil Co Yugraneft (in liquidation) v Abramovich and others* [2008] EWHC 2613

(Comm) and we now quote the relevant excerpts:

[17] ... Clearly, the essential function of judicial estoppel is to prevent intentional inconsistency while the object of the rule is to protect the court from the perversion of judicial machinery. Judicial estoppel seeks to address the incongruity of allowing a party to assert a position in one court and the opposite in another tribunal (*Peguam Negara Malaysia v Nurul Izzah bt Anwar & Ors* [2017] MJLU 273).

[34] So much for the principle of judicial estoppel and its purpose, which essentially is to estop a party who has successfully asserted a position in a prior proceeding from asserting an inconsistent position in a subsequent proceeding.

[35] By way of context, Andrew had commenced Suit 352 against TS Kam, the third to ninth defendants, a few other companies (all collectively referred to as the corporate defendants) and two other individuals who were the company secretary to the corporate defendants to enforce the SA. Striking out applications were made by all the corporate defendants where the applications by TS Kam, RMDC and ROM and the other defendants in this OS were dismissed. There was also an injunction granted to Andrew.

[36] It is now submitted by counsels for the plaintiffs and TS Kam that Andrew had taken a different legal position in Suit 352 and in the OS and having obtained an advantage, cannot now be allowed to resile from it. It was said Andrew's position in Suit 352 was that the SA would require TS Kam to transfer his seven shares in RMDC, and the corporate defendants to transfer their shares in RMDC to Andrew; whereas in the OS for TS Kam to transfer his seven shares in RMDC, and his shares in the fifth to eighth defendants, to Andrew. We were referred to a table in encl 63 showing various paras in Andrew's affidavits in the striking out applications in Suit 352 and affidavits in the OS and para 60.2 of the submission filed in the Court of Appeal.

[37] Counsel for Andrew said it was never the plaintiffs' or TS Kam's case that judicial estoppel applied. It was only raised in TS Kam's third affidavit where it was stated that Andrew's position in respect of the SA is a radical departure from the position taken by him before the court of appeal arising from Suit 352. The same too in the application by Andrew to convert the OS to a writ where the High Court dismissed it on the premise that the sole question to be dealt in the OS was whether the SA is illegal for having contravened s 228 of the CA 2016. This was also the plaintiffs' submissions then.

[38] We agree with the plaintiffs' and TS Kam's counsel that as judicial estoppel is based on a position taken by a party, it could not have been pleaded, as it were. It was only when it was stated that s 228 of the CA 2016 did not apply as Andrew was not asking for the shares, that judicial estoppel is said to

arise. The plaintiffs support TS Kam's position on this. Hence judicial estoppel as an issue can be considered.

[39] Having considered the learned JC's grounds, in particular paras 28 to 41, we agree with the analysis that the context upon which Andrew's position was taken was to address a specific application. Our attention is drawn to para 34 where if Andrew's claim was to prevail in Suit 352, he will hold 50% of TS Kam's entire shares in RMDC whether they are held directly by TS Kam or through the fifth to eighth defendants and that there is no agreement with the fifth to eighth defendants to transfer their shares in RMDC to Andrew as was evident from prayer (iv) of the claim in Suit 352. Due to Andrew's ownership of TS Kam's indirect shareholding, it follows that Andrew can require TS Kam to cause the fifth to eighth defendants to transfer their shares in RMDC to Andrew. The transfer of the fifth to eighth defendants' shares in RMDC are not necessary steps to be taken as Andrew may well be contented with TS Kam transferring his shares in the fifth to eighth defendants to him. It was in that context that it was held there was no suggestion of a legal position taken that the fifth to eighth defendants are obliged to transfer their shares in RMDC and we agree with that finding.

[40] In the circumstances of the case, we find that judicial estoppel does not arise.

[41] The learned JC in para 42 of his grounds further found that Andrew did not succeed in the striking out applications and the ad interim injunction because of the assertion that the fifth to eighth defendants are to transfer their RMDC shares to him.

[42] We therefore found it necessary to peruse the grounds in relation to the striking out and ad interim injunction dated 20 November 2017 and 30 November 2017 respectively, in encl 27. These applications were not heard before the same learned JC who heard the OS.

[43] In para 53 of the grounds in relation to the application by TS Kam, RMDC and ROM to strike out Suit 352, it was stated Andrew is seeking various declaratory reliefs premised on the SA and the defendants are challenging the validity of the SA on the grounds among others that the SA is void and unenforceable and unenforceable because there is no consideration. As stated in paras 54 to 66 of the grounds, what was required was whether on the facts as pleaded, a reasonable cause of action for breach of contract has been established. At para 56 it was stated that based on the provisions of the SA, Andrew and TS Kam have agreed that 50% of TS Kam's interest in RMDC and ROM belong to Andrew and in para 59 that on the face of the pleaded facts there is a contractual relationship through the SA and there are breaches, one of

which was TS Kam's decision to sell to Matang Bhd. There were other issues too such as consideration for the SA and that the SA was not intended to create a legal relationship as it was a family matter.

[44] With regard to RMDC and ROM, this pertained to the call for a members' meeting to remove Andrew as a director from the respective boards.

[45] The learned JC then concluded it was based on those reasons that the facts pleaded are more than sufficient to establish a reasonable cause of action against TS Kam, RMDC and ROM.

[46] The reference in para 27 of the grounds where it was stated 'it is the plaintiff's position that the first defendant's entire interest in the second defendant not only refer to the shares which is registered directly in the first defendant's name but also includes the shares in the second defendant which are held by the fourth to 11th defendants' has also to be seen in the context of what we have stated earlier.

[47] With regard to the application to strike out by the corporate defendants, it was stated in para 72 of the grounds that Andrew is seeking, inter alia, that his removal as director be declared null and void and he be reinstated as director. It could not therefore said that in so far as Andrew's removal is concerned that there is no reasonable cause of action disclosed.

[48] In the light of the above conclusion by the learned JC that premised on those facts that there is a reasonable cause of action as against all the defendants in Suit 352, we find it cannot therefore be said that Andrew succeeded in the dismissal of the striking out applications premised on the legal position taken.

[49] For the ad interim injunction, the above were also the serious issues to be tried. Further, the balance of convenience was found to tilt towards Andrew where in particular the status of the lands had to be maintained so as not to prejudice the integrity of the case; and if sold, that lands which constitute the fundamental and integral part of the SA which is the basis of the dispute would no longer be in existence. Refer to para 46 of the grounds.

[50] On this, the learned JC in his grounds on the OS in para 33 stated there was nothing to suggest the ad interim granted was in response to any legal position taken; and it was to preserve the value of Andrew's 50% shares in RMDC, be it held directly or indirectly and it would be futile if only TS Kam is enjoined but not the companies who hold the shares of RMDC. For the reasons given earlier, we agree with that finding.

[51] Premised on the learned JC's grounds as to why the striking out was dismissed and the ad interim injunction was allowed, we find no reason to disagree with the finding of the learned JC in this OS. We have noted the finding as per para 42 of the grounds that Andrew did not succeed in the striking out applications and the ad interim injunction because of the assertion that the fourth to eighth defendants are to transfer their RMDC shares to him.

[52] Therefore, there was no advantage obtained by Andrew in the striking out or ad interim injunction such that judicial estoppel does not operate. In *Nurul Izzah* it was said at p 674:

> [21] In any event, in law, the doctrine of judicial estoppel will only apply to a party where the said party, the appellant in this appeal, had successfully and unequivocally persuaded the court on, or asserted, a position in the Selangor Government case so that when that had taken place, the appellant would be estopped from asserting an inconsistent position in a subsequent proceeding which in this appeal is the application for judicial review.The essential function of judicial estoppel is to prevent intentional inconsistency while the object of the rule is to protect the court from the perversion of judicial machinery. Judicial estoppel seeks to address the incongruity of allowing a party to assert a position in one court and the opposite in another tribunal (*Yugraneft* at para 429). We were satisfied, for the reasons that we have given in the preceding para, that no such successful or unequivocal persuasion or assertion was ever made by the appellant in the earlier Selangor Government case for the doctrine to apply in the instant application for judicial review. The appellant merely did not raise an objection to the leave application. The condition precedent for the doctrine to apply therefore was not fulfilled.

[53] On 12 January 2022, the appeal by TS Kam to strike out was dismissed by another panel of this court and the appeals by the other defendants to strike out were allowed. That same panel allowed the appeals by TS Kam and the other defendants in relation to the injunction.

[54] Premised on this latest development, it can be now be seen that Andrew would not have obtained any advantage in the ad interim injunction based on the position taken. He also would not have obtained any advantage in the striking out application insofar as RMDC, ROM and the other defendants are concerned. With regard to TS Kam's striking out, we have explained in our para 43 the facts that led to his application being dismissed.

[55] To recap, we find that judicial estoppel does not apply. In any event, it cannot be said that Andrew had obtained any advantage in having the striking out application by TS Kam dismissed. We also reiterate the preceding para in Andrew not having obtained any advantage over the others in the striking out and the ad interim injunction. This is our sole ground in relation to judicial estoppel and we do not propose to deal with the other issues raised.

Whether the SA contravenes s 228 of the CA 2016

[56] We turn now to whether the SA contravenes s 228 of the CA 2016. Section 228(1) and (2) had earlier been set out and we do not intend to reproduce it here.

[57] Section 228(1) of the CA 2016 essentially states that a company shall not enter or carry into effect any arrangement or transaction where a director or substantial shareholder of the company or its holding company or a person connected with a director or substantial shareholder acquires or is to acquire shares or non-cash assets of the requisite value, from the company.

[58] A reading of the aforesaid provision renders it clear that it applies to an arrangement or transaction between a company and a director which involves a disposal of non-cash assets between the company and the said director.

[59] Clause 1 of the SA provides as follows:

> Fifty (50) per cent of the Father's entire interests in Raub Mining & Development Company Sdn Bhd ('RMDC') (Company No: 4708-A) — which includes the Father's entire interests in Raub Oil Mill Sdn Bhd ('ROM') (Company No: 26175-P), a wholly-owned subsidiary of RMDC — belongs to the Son (the 'Son's Portion').

'Father' here refers to TS Kam and 'Son' refers to Andrew.

[60] In our instant case, the transfer of shares contemplated by the SA is in respect of the shares registered in TS Kam's name in RMDC and of the shares registered in TS Kam's name in the fifth to ninth defendants. There is no change to the number of shares held by the fifth to ninth defendants in RMDC as there is no disposal of such shares. The only change will be in respect of the shares registered in the names of TS Kam and Andrew.

[61] The SA does not result in the disposal of the shares held by the fifth to ninth defendants in RMDC. There is thus no change to the assets or value of the fifth to ninth defendants in so far as RMDC is concerned. Refer to the share transfer forms, exh DSAK1 in Andrew's affidavit in reply, encl 11/58–73.

[62] Clause 1 of the SA has expressly stated that 50% of TS Kam's entire interest in RMDC belongs to Andrew and it follows that the transfer of such RMDC shares to Andrew would not involve any change in the beneficial ownership of the same.

[63] The above is consistent with the meaning of disposal, which is a transfer or change of ownership, as held in *Pioneer Haven*. This was said at p 196:

A [98] Our reasons are manifold. We can begin by construing the interpretation to be given to the word 'disposal' in s 132C of the Act.

[99] In this regard, statutory interpretation of the word 'disposal' can be seen in the authority of *Re Margart Pty Hamilton v Westpac Banking Corporation & Another* [1985] BCLC 314, where the NSW Supreme court found that in legal terms, the
B word 'disposition' when used with reference to property normally connotes a change in the beneficial ownership of an asset by transfer or other type of dealing. Thus, it is clear that it would only be considered a 'disposal' if there was in fact a transfer of or change in beneficial ownership.

[100] It is interesting to note that Australian courts have consistently held that the
C term 'disposition' should be construed as 'transfer' or 'alienate', whereby there must be some change that takes out of the company or transfers beneficial ownership in a corporate asset and passes it to someone else (see *Australian Trade Commission v Film Funding and Management Pty Ltd* [87 ALR 49] and *Re Loteka Limited* [1989] 15 ACLR 620. The Australian cases are persuasive in assisting us in determining this
D issue.

[64] Here, there is no disposal of RMDC shares by the fifth to ninth defendants to Andrew nor any acquisition of such shares by him. There is therefore no contravention of s 228 of the CA 2016.
E

[65] We further refer to *NHB Ltd and another v Hoare and others* [2006] EWHC 73 (Ch) 649 dealing with our equivalent provision on property transactions involving directors. The provision is set out in para 36 of p 662. At
F p 667 this was stated:

[48] ... Surely, s 320(1)(a) is about cases where a director or a person connected with him purchases assets from a company at an undervalue, so that the director or connected person is in a position to make a gain at the expense of the company; that is the situation in which the director is liable to account to the company under s
G 322(3)(a). And conversely s 320(1)(b) is about cases where a director or a person connected with him sells assets to a company at an overvalue, so that the company is exposed to a loss which ought to have fallen on the director or the connected person; that is the situation in which the director is liable to indemnify the company under s 322(3)(b).

H

[66] This underscores the point that the arrangement or transaction is 'with the company', which is not the case here.

CONCLUSION

I

[67] We therefore find no merits in the appeal. We dismiss the appeal and the decision of the High Court dated 26 June 2020 is affirmed. We further award RM50,000 costs to the second defendant subject to allocatur.

Appeal dismissed with costs.

Reported by K Selvaraju